UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Richmond, California)

SAFEWAY INC.

Employer,

and

Case 32-UC-393

BAKERY, CONFECTIONERY, TOBACCO
WORKERS & GRAIN MILLERS UNION,
LOCAL 119

Petitioner

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Safeway, Inc., herein called Safeway, is engaged in commerce within the meaning of the Act. I also find that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Bakery, Confectionery, Tobacco Workers & Grain Millers Union Local 119, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union seeks to clarify the historically-recognized bargaining unit consisting of employees in various job classifications engaged in the baking and production of breads at Safeway's Richmond, California bread plant to include six to eight employees supplied to Safeway by a subcontractor, DSD Communications, Inc. ("DSD"). The DSD employees are engaged in the process of inserting coupons into bread packages.[1] Citing *M.B. Sturgis*, 331 NLRB 1298 (2000), the Union contends that Safeway and DSD constitute joint employers of the DSD coupon insertion employees, and that the DSD coupon insertion employees share a community of interest with the Safeway bread production employees, such that it is appropriate to accrete the DSD coupon insertion employees in the preexisting unit of Safeway bread production employees. Conversely, also relying upon *M.B. Sturgis*, Safeway contends that the Union has not established that Safeway and DSD are joint employers of the coupon insertion employees, has not established that the DSD coupon insertion employees have little or no separate group identity from the Safeway employees, and has not established that the DSD coupon insertion employees have an overwhelming community of interest with the Safeway employees. Because I find that Safeway and DSD do not constitute joint employers of the DSD coupon insertion employees, and further find that the Safeway and DSD employees do not share the overwhelming community of interest necessary for an accretion, I find that clarification of the bargaining unit is not warranted, and I am accordingly dismissing the petition.

[1] Although notified of the filing of the petition and the hearing in this matter, DSD did not appear or otherwise participate in this proceeding.

BACKGROUND

Safeway operates a bread manufacturing and production facility in Richmond, California, herein called the Richmond facility, which produces breads for the Northern California area along with some shipments to Nevada and the Los Angeles, California area. The Richmond facility has three production lines: the variety bread line, the automatic bread line, and the bun line.[2] The equipment on these three production lines, including a scaler, mixer, divider, molder, proof box, oven, and cooler, has been operated by bargaining unit personnel.

In August 2001, Safeway and DSD entered into a contract, the "dsd Communications, Inc. breadMoney[sm] Distribution Agreement," herein called the Coupon Agreement, whereby DSD agreed to obtain coupons from third party manufacturers and then insert those coupons in certain bread packages produced in the automatic bread line at the Richmond facility. DSD is responsible for obtaining and storing the coupons at the Richmond facility, and utilizes its own equipment for inserting the plastic wrapped coupons into the bread packaging. DSD obtains its compensation from the manufacturers whose coupons are inserted in the Safeway bread packages. DSD receives no compensation from Safeway.

The trial run of this arrangement between Safeway and DSD took place between April 2002 and October 2002, and that arrangement was subsequently extended. DSD initially installed and tested its proprietary coupon-insertion equipment using its own employees and contractors. The DSD coupon-insertion equipment is positioned in the wrapper area of the automatic bread line. For about five or six months during the year, the DSD employees are not present at the Richmond facility and the

[2] Details regarding the variety bread line and bun line are not pertinent to the present proceeding, insofar as the coupon-insertion equipment and DSD employees discussed below are used only in conjunction with the automatic bread line.

DSD coupon insertion equipment is not used during these periods. Safeway operates its automatic bread line even when DSD is not operating its coupon insertion equipment.

ANALYSIS

To establish that two employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). In particular, the employers must meaningfully affect matters relating to hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB at 882; *TLI, Inc.*, 271 NLRB 798 (1984).

There is no evidence in the record indicating that Safeway plays any role in determining who is hired by DSD as coupon inserters. Instead, the evidence shows that DSD managers Joe Kitterman or Gene Elders hired the DSD employees working at the Richmond facility, and that Safeway did not participate in any employment interviews or otherwise provide any input into DSD's hiring decisions.

With respect to Safeway's authority in disciplining DSD employees, the record shows that DSD employees are required to sign forms acknowledging receipt of Safeway's Plant Rules. These receipt forms indicate that the employees will be subject to discipline up to and including termination for engaging in misconduct or failing to meet company attendance, performance or safety expectations. However, there is no evidence in the record that Safeway directly enforces these rules with regard to the DSD employees; thus, there is no evidence that Safeway has disciplined DSD employees or that it has requested or even suggested that any DSD employees be disciplined or fired. To the contrary, there is evidence in the record that DSD employees have been terminated, but the evidence indicates that only DSD, and not Safeway, played any role in disciplining or firing the DSD employees.[3] Petitioner accords great weight to the fact that the Coupon Agreement does not by its terms prohibit Safeway from jointly supervising and/or disciplining DSD employees. I do not attribute much significance to the absence of such a prohibition, as it is equally true that the subcontract does not expressly provide Safeway with the authority to jointly supervise or to discipline the DSD employees.

The supervision and day-to-day direction of the work of the DSD employees has been performed by the DSD on-site manager, Gene Elders. He has been responsible for setting the DSD employees' daily work schedules, addressing their attendance and disciplinary issues, scheduling their vacations, and evaluating their productivity and performance for purposes of determining merit increases. There is evidence that, in Elders' absence during portions of the second shift, the second shift lead operator, Fred Mayfield, is responsible for directing the work of the DSD employees, including determining when the DSD employees will have their breaks, and sometimes training DSD employees.[4] While it appears that lead operator Mayfield does not possess the full array of duties that manager Elders does, the record contains only conclusory and unpersuasive testimony that Safeway managers supervise DSD employees during the second shift when Elders is not present. Therefore, taking into account Elder's role in supervising the DSD employees on the first shift, the work direction functions performed by DSD lead operator Mayfield at times during second shift, and the absence of evidence

[3] While it is true that Safeway line supervisor Dean Paul expressed the opinion that he would have the ability to remove a DSD employee from Safeway's premises in the event of some threat to employee or to food safety caused by the DSD employee, there was no evidence in the record of any such event ever occurring. See *Dean & Deluca New York, Inc.*, 338 NLRB No. 159 slip op. at 4, n.9 (2003) (minimizing significance of employer's power to require concessionaire to remove employee from premises where the employer could not require that concessionaire fire employee). Moreover, even if one concedes Safeway's power to remove a DSD employee from its premises, such power readily fits within an employer's prerogatives to prevent disruption of its own operations and see that it is obtaining the services it contracted for. Such prerogatives do not in and of themselves mandate a finding of joint employer status. *Southern California Gas Co*., 302 NLRB 456, 461 (1991).

[4] Mayfield has a slightly higher wage rate than the DSD employees, other than Elders.

that Safeway managers directly supervise DSD employees at times when Elders is not present, I conclude on balance that the record does not reflect the existence of common supervision by Safeway and DSD over DSD's employees. See *Computer Associates, International, Inc.*, 332 NLRB 1166 n. 2 (2000) (finding joint employer status based on the employer's ongoing, close and substantial supervision of subcontractor's employees).

In arguing for joint employer status, Petitioner also relies on the fact that DSD employees are apprised of, and asked to comply with, Safeway's Good Manufacturing Practices (GMP's) and Plant Rules. The GMP's are derived from, and intended to satisfy, federal statutory and regulatory requirements with respect to food safety. Safeway's program compliance supervisor, Donald Robert O'Chse, testified that the Plant Rules he brought to the attention of the DSD employees were those rules that were related to food safety and employee safety, or which bore a direct connection to the working relationship between DSD employees and Safeway employees (e.g., sexual harassment). Conversely, O'Chse did not specifically apprise DSD employees of those Plant Rules that only affected the relationship between DSD and its own employees (e.g., dishonesty or falsification of DSD company documents or timecards, insubordination with a DSD supervisor, etc.). It appears that Safeway's efforts to ensure that DSD employees were aware of proper safety protocol and were provided with hair nets and gloves were little more than an effort by Safeway to comply with federal or state laws pertaining to food or employee safety. In the Board's recent decision in *Aldworth Co., Inc.*, 338 NLRB No. 22, slip op. at 3-4 (2002), the Board found that actions taken pursuant to government statutes and regulations are not indicative of joint employer status. Instead, the Board premised its joint employer finding there on the respondent having voluntarily enmeshed itself in areas of its subcontractor's operations beyond what the law may have required. *Aldworth*, slip op. at 4. Because Petitioner here has offered nothing more than evidence of Safeway's efforts to ensure that DSD employees comply with statutes and regulations, Petitioner's evidence with respect to compliance by DSD employees with Safeway Plant Rules and GMP's does not support a finding that Safeway is a joint employer in this case.

Similarly, there is some evidence of instances in which Safeway managers have advised DSD managers or employees not to touch the bread products or Safeway's bread production equipment. Even assuming arguendo that Safeway is not correct in describing such incidents as "isolated," I find that these examples again demonstrate Safeway's power to ensure compliance with governmental requirements,[5] and/or Safeway's power to prevent disruption of its own operations and make certain it is obtaining the services for which it has contracted. *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

On the basis of the foregoing, I conclude that Petitioner has not shown that Safeway meaningfully affects matters relating to the hiring, firing, discipline, supervision and direction of DSD employees. I note, however, the following additional factors that further militate against a finding of joint employer status.

Wages: The record reflects that the wages of the DSD employees are less than the wages of the Safeway employees.[6] Further, it is uncontested that DSD pays the DSD employees and Safeway pays the Safeway employees. Moreover, because DSD receives no compensation from Safeway, the

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[5] *Aldworth Company, Inc.*, 338 NLRB No. 22 (2002). I also note the existence of evidence in the record that any visitors to Safeway's plant, including third party vendors or subcontractors other than DSD, are informed of and expected to comply with at least certain of the Plant Rules and GMP's pertaining to safety.

[6] The wage rates of DSD employees range from approximately \$12.50 to \$18.50, while the wage rates of the Safeway employees in the bargaining unit range from approximately \$17.83 to \$19.55.

DSD wage rates are not dependent on the levels of compensation Safeway pays to DSD. In short, there is nothing about the source or amount of the respective wages paid to Safeway and DSD employees that would support a joint employer finding in this case.

Benefits: while there is scant evidence in the record as to the respective benefits of Safeway and DSD employees, it is apparent that the two groups do not receive identical benefits. For example, DSD employees appear to receive vision benefits, while there is no indication in the contract that Safeway employees do. Conversely, Safeway employees appear to receive pension and retirement benefits under the contract, while there is no indication in the record that DSD employees receive pension and retirement benefits. Safeway employees receive paid holidays, while there is no evidence that DSD employees receive paid holidays.

Subcontract Terms: The Board's recent cases make clear that a key to joint employer status is whether the putative joint employer's control over employment matters is direct and immediate. See *Airborne Freight Company*, 338 NLRB No. 72 slip op. at 1, n.1 (2002). The Board has correspondingly distanced itself from earlier cases that premised joint employer status on a putative joint employer's contractual authority to control some employment conditions even if that authority was not exercised. See *Jewel Tea Co.*, 162 NLRB 508 (1966); *Airborne*, *supra*, slip op. at 2, n.3. It is true that the Coupon Agreement permits Safeway to exclude coupons that Safeway deems offensive, illegal or objectionable, and permits Safeway to declare a default under the subcontract if Safeway in its discretion determines that DSD's operations compromise Safeway's product quality or consumer experience. However, keeping the principles of *Airborne* in mind, I note that this authority goes to the heart of the contractor/subcontractor relationship and not to Safeway's authority over the subcontractor's employees.[7] In sum, neither Safeway's theoretical, unexercised powers nor its actual exercised powers under the subcontract, rise to the level of meaningful codetermination of the essential terms and conditions of employment of the DSD employees necessary for a finding of joint employer status.[8]

Even if I were to conclude that Safeway and DSD are joint employers in this case, it would not be appropriate to accrete the DSD coupon-insertion employees into the Safeway unit unless it were further shown that the DSD employees had little or no separate group identity, and shared an overwhelming community of interest with the Safeway employees in the preexisting unit. *J.E. Higgins Lumber Company*, 332 NLRB No. 109 (2000); *Compact Video Services*, 284 NLRB 117, 119-120 (1987). I cannot so find.

In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. See *J.C. Penney Co.,* 328 NLRB 766 (1999); and *Armco, Inc.,* 271 NLRB 350, 351 (1984). Similarly, the Board when considering the appropriateness of accreting employees into an established bargaining unit evaluates the following factors: the integration of operations, centralization of managerial and administrative control,

[7] I also note that there is no evidence in the record showing that Safeway has in fact rejected any coupons that DSD sought to utilize, or showing that Safeway has declared any defaults under the subcontract.

[8] *Villa Maria Nursing and Rehabilitation Center, Inc.*, 335 NLRB No. 99 (2001) further illustrates that actual practice and not bare subcontract terms are given more weight by the Board. In that case, there was a written agreement between the employer and its housekeeping subcontractor that permitted the employer to ask for the removal of any subcontractor personnel not acceptable to the employer; that required the subcontractor to discipline its employees who acted in a manner unacceptable to the employer; and that established a joint review committee made up of representatives of the employer and the subcontractor to engage in a quarterly review of the subcontractor's performance. Despite this clear contract language, the Board found that none of these factors, individually or cumulatively, proved that the employer oversaw the daily work of, or exercised indirect but effective control over, the subcontractor's employees.

geographic proximity, similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history, and interchange of employees. *American Medical Response, Inc.*, 335 NLRB No. 90, slip op. at 11 (2001).

Applying these factors, I have concluded that the few similar or common terms and conditions of employment between the DSD and Safeway employees (e.g., compliance with safety rules, common lunch/break times and areas, similar skills used in operating machinery) are substantially outweighed by the dissimilar terms and conditions of employment between the DSD and Safeway employees. Specifically, the record reflects that the DSD employees are only present at the facility intermittently for 6-7 months out of the year, in stark contrast to the year-round employment of Safeway's employees at the facility. The DSD and Safeway employees receive different wages and benefits, and wear different uniforms. It is also significant that there is no evidence in the record that any DSD employees have gone on to subsequent employment with Safeway or that they are hired by DSD with any expectation of being hired by Safeway.[9] The DSD and Safeway employees also serve different clientele; the DSD employees serve DSD and the national bread manufacturers who utilize DSD's services, while the Safeway employees serve Safeway and the bread-buying public.[10] For all of these reasons, I conclude that Petitioner has not established the existence of an overwhelming community of interest between the DSD employees and the Safeway unit employees or that the DSD coupon-inserting employees have

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9 There is also no indication that Safeway employees have been permitted to operate DSD machinery, or vice versa.

10 See *Trumbull Memorial Hospital*, 338 NLRB No. 132 (8-RC-16381) (2003), (insufficient community of interest where the two groups of employees had similar skills, worked in close proximity with each other, and shared certain privileges and identification badges, yet received different wages, were covered under different retirement and hospitalization plans and vacation policies, and served different clientele. *Trumbull*, slip op. at 2.

little or no separate group identity. See *Towne Ford Sales*, 270 NLRB 311 (1984); *Passavant Retirement and Health Center*, 313 NLRB 1216 (1994).[11]

ORDER

IT IS HEREBY ORDERED that the petition in this case is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 28, 2003.

DATED AT Oakland, California, this 14th day of July, 2003.

/s/ Alan B. Reichard
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[11] Because I have concluded that accretion is not appropriate in this case, I need not and do not make any finding as to whether DSD manager Gene Elders is a supervisor within the meaning of Section 2(11) of the Act.